No. 82 - 6933

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

MARION ALBERT PRUETT,	)
	)
Petitioner,	)
	)
-against-	)
	)
STATE OF MISSISSIPPI,	)
	)
Respondent.	)

==========

PETITION FOR WRIT OF CERTIORARI TO
THE STATE OF MISSISSIPPI

==========

STEPHEN B. BRIGHT
Suite 600
Healey Building
57 Forsyth Street, N.W.
Atlanta, Georgia 30303

ATTORNEY ADVISOR
FOR PETITIONER

QUESTIONS PRESENTED

I. Whether the imposition of the death sentence in this case violate the Sixth, Eighth and Fourteenth Amendments to the Constitution where the sentence was imposed by a Mississippi court for a homicide that was occurred in Alabama and the only basis for jurisdiction was the felony-murder rule.

II. Whether the imposition of the death sentence in this case violate the Eighth and Fourteenth Amendments to the Constitution where:

A. The Mississippi Supreme Court employed a severely overbroad construction of the statutory phrase "especially heinous, atrocious or cruel" in upholding petitioner's death sentence, so as to render this case indistinguishable from cases in which the death penalty is not imposed.

B. The jury was exposed to highly prejudicial and inflammatory evidence and argument not falling within any of the legislatively enumerated statutory aggravating circumstances so as to undermine this Court's requirement that the jury's discretion be limited to insure the reliability and rationality of the death sentence.

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OPINION BELOW

The opinion of the Supreme Court of Mississippi affirming petitioner's conviction of capital murder and sentence of death by lethal gas is not yet officially reported, but is reproduced in the Appendix. (A. 13-25).[1/]

JURISDICTION

The jurisdiction of this Court rests upon 28 U.S.C. § 1257(3), the petitioner having asserted below and asserting here a deprivation of rights secured by the Constitution of the United States, and Rule 17 of the United States Supreme Court Rules confers certiorari jurisdiction in this Court to review the judgment in this case.

The judgment of the Supreme Court of Mississippi was entered on February 23, 1983. A timely petition for rehearing was denied by that court on March 16, 1983.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional and statutory provisions:

1. The Sixth Amendment to the Constitution of the United States which provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law....

1/ Numbers preceded by "A." refer to pages of the Appendix; numbers preceded by "R." refer to transcript pages not reproduced in the Appendix.

2. The Eighth Amendment to the Constitution of the United States which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

3. The Fourteenth Amendment to the Constitution of the United States which provides in pertinent part:

> [N]or shall any State deprive any person of life, liberty or property without due process of law.

4. Article 6, Section 156 of the Constitution of the State of Mississippi which provides:

> The circuit court shall have original jurisdiction in all matters civil and criminal in this state not vested by this Constitution in some other Court and such appellate jurisdiction as shall be prescribed by law.

5. This case also involves the following provisions of the statutes of the State of Mississippi, which are set forth in the Appendix to this petition: Miss. Code Ann. §§ 97-3-19, 9-11-1, 99-11-17, 99-11-21, 99-19-101, 99-19-105 (1972 & Supp. 1982). (A. 1-8).

6. This case also involves the following provisions of the statutes of the State of Alabama, which are set forth in the Appendix to this petition: Ala. Code §§ 13A-5-40, 13A-6-43 (1975). (A. 9-12).

STATEMENT OF THE CASE

On September 17, 1981, the Unifirst Federal Savings and Loan Association, in Jackson, Mississippi, Metrocenter Caravel, was robbed. (A. 14). Opal H. Lowe a/k/a Peggy Lowe, an employee of the bank, was abducted during the robbery, transported to Sumter County, Alabama, where she was fatally shot. A Hinds

County grand jury subsequently indicted Marion Albert Pruett of capital murder. (R. 18).

As the case comes to this Court, the Supreme Court of Mississippi has sustained petitioner Marion Pruett's sentence of death on the following findings: (1) that the "gunshot was fired in the State of Alabama, and the fatal injury...was sustained in the State of Alabama;" (A. 15), (quoting stipulation of the parties for hearing on jurisdiction) and (2) that the record fully supported the jury's finding of statutory circumstances and that the death sentence was not disproportionate to the crime committed by petitioner. (A. 21-22). Thus, the Supreme Court affirmed the sentence of death for capital murder under Mississippi Code Ann. § 97-3-19(2)(e).

In view of the Mississippi Supreme Court's findings and conclusions, a detailed statement of the facts and proceedings below is unnecessary for consideration of the issues presented herein -- (1) whether petitioner's sentence of death is void because the Mississippi courts did not have jurisdiction over a homicide that occurred in Alabama, and (2) whether the introduction and consideration of non-statutory aggravating circumstances unconstitutionally polluted the sentence of death. Additional aspects of the proceedings below are developed with the discussions of these issues where helpful.

REASONS FOR GRANTING THE WRIT

For the reasons which follow, this Court should issue a writ of certiorari to review the decision of the Supreme Court of Mississippi.

I. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE SUPREME COURT OF MISSISSIPPI VIOLATED THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BY AFFIRMING PETITIONER'S DEATH SENTENCE FOR A HOMICIDE THAT OCCURRED COMPLETELY IN ALABAMA

A. Introduction

This Court should grant certiorari because this case presents a novel issue of whether the courts of one state can assert jurisdiction over a homicide that occurred completely in another state on the basis of antecedent criminal activity in the first state. We have diligently researched this issue and although we have found many venue cases that have involved county-to-county activity, we have not been able to find a single case involving state-to-state activity where the accused was tried in one state for a homicide that occurred totally in another state.

Mississippi's jurisdiction in this case fails for two reasons. First, under traditional principles of criminal jurisdiction, Mississippi's imposing a death sentence for a homicide that occurred completely in Alabama violates the Sixth, Eighth and Fourteenth Amendments to the Constitution, and the felony-murder doctrine does not provide an adequate cure to this flaw. Second, the felony-murder rule is inapplicable in this case because the underlying felony of kidnapping had come to an end in Alabama, and a new crime of homicide was begun.

B. Mississippi's Exercise of Jurisdiction Over the Petitioner for Capital Murder for a Homicide that Occurred Completely in Alabama, Violated the Sixth, Eighth, and Fourteenth Amendments to the Constitution

Marion Pruett was indicted, convicted and sentenced to death for violating Section 97-3-19(2)(e), Mississippi Code of 1972, Annotated, which defines capital murder as follows:

> The killing of a human being without the authority of law by any means or any manner shall be capital murder...when done...by any person engaged in the commission of the crime of rape, burglary, kidnapping....

The elements of capital murder under this statute are: (1) an unlawful killing, (2) while engaged in a specified crime, (in the case at bar a kidnapping). In this case, the first element of capital murder, the unlawful killing, occurred in its entirety outside the territorial jurisdiction of Mississippi.

The Mississippi courts only have jurisdiction over offenses committed in Mississippi, Miss. Const. art. VI, § 156; Miss. Code Ann. § 99-11-1 (1972), and venue must be proven beyond a reasonable doubt. Presley v. State, 63 So.2d 551, 554-55 (Miss. 1953). In this case, the Mississippi Supreme Court predicated its jurisdiction on Mississippi Code Annotated, Section 99-11-17, which provides:

> Where an offense is commenced in this State and consummated out of it, either directly or by the accused or by any means or agency procured by or proceeding from him, he may be indicted and tried in the county in which such offense commenced or from which such means or agency proceeded.

Although this statute confers jurisdiction over crimes that are begun in Mississippi and completed in other states, the killing in this case was not begun in Mississippi, but rather evolved completely in Alabama, and Mississippi's assertion of jurisdiction under these facts violates the Sixth, Eighth and Fourteenth Amendments to the Constitution.

Proper jurisdiction and venue in criminal cases are guaranteed by both the Sixth Amendment as applied to the states through the Fourteenth Amendment, and the Fourteenth Amendment itself as a fundamental ingredient of due process. When a death sentence is imposed by a court that was without jurisdiction over

the offense, the Eighth Amendment protection against cruel and unusual punishment is violated.

The Sixth Amendment to the United States Constitution provides in part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . . .

U.S. Const. amend. VI (emphasis supplied).[2/] This Court has held that this provision of the Sixth Amendment guarantees that "an accused cannot be tried in one district on an indictment showing that the offense was not committed in that district." Salinger v. Loisel, 265 U.S. 224, 232 (1924). Although this Court has not previously applied the above emphasized portion of the Sixth Amendment to the states through the Due Process Clause of the Fourteenth Amendment, this Court has done so with other guarantees of the Sixth Amendment. Williams v. Florida, 399 U.S. 78 (1970); Duncan v. Louisiana, 391 U.S. 145 (1968).

In addition to this specific locale requirement of the Sixth Amendment, the Fourteenth Amendment independently restricts a state's exercise of jurisdiction, because proper jurisdiction and venue are fundamental to due process. As stated in United

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2/ Even though the Sixth Amendment explicitly preserves only the common law institution of vincinage, the distinctions between jurisdiction, venue, and vincinage have become considerably muddled. See United States v. Anderson, 328 U.S. 699, 703 (1946); George, Extraterritorial Application of Penal Legislation, 64 Mich. L. Rev. 609, 610 (1966); Blume, The Place of Trial of Criminal Cases: Constitutional Vincinage and Venue, 43 Mich. L. Rev. 59, 91 (1944). In any event, the problem of determining in which state, district, and/or county the crime was committed is the same, and the due process consequences that result from an improper determination of jurisdiction and venue are the same. Thus, although we will generally distinguish between jurisdiction and venue, (but not vicinage), for convenience, we will follow convention and use the term "jurisdiction" to encompass all three of these concepts.

States v. Johnson, 323 U.S. 273 (1944): "Questions of venue [and jurisdiction] in criminal cases . . . are not merely matters of formal legal procedure. They raise deep issues of public policy. . . ." Id. at 276.[3] The due process interests in this case are of even greater magnitude because Mr. Pruett has been sentenced to die in Mississippi's gas chamber. See Coker v. Georgia, 433 U.S. 584, 598 (1977) (plurality opinion); Gardner v. Florida, 430 U.S. 349, 357-58 (1977) (plurality opinion); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion); Furman v. Georgia, 408 U.S. 238, 286-91 (1972) (Brennan, J., concurring); id. at 306 (Stewart, J., concurring); id. at 316 (Marshall, J., concurring).

> When a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed. Powell v. Alabama, 287 U.S. 45, 71 (1932); Reid v. Covert, 354 U.S. 1, 77 (1957) (Harlan, J., concurring in result).

Gregg v. Georgia, 428 U.S. 153, 187 (1976) (plurality opinion).

In United States v. Lombardo, 241 U.S. 73 (1916), the Court construed a federal venue statute, which was almost identical to the Mississippi statute at issue, in light of the constitutional restrictions on the territorial jurisdiction of criminal courts.[4] The Court held that venue in criminal matters is proper

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3/ Indeed, even in civil cases which only involve property interests instead of life or liberty interests, state court jurisdiction raises substantial due process issues. See, e.g., World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 289 (1980); Pennoyer v. Neff, 95 U.S. 714, 733 (1878) ("proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law.").

4/ In Lombardo the Government relied upon the following statute for its claim of jurisdiction in the District of Washington:

> When any offense against the United States is begun in one judicial district and completed in another, it shall be deemed to have been committed in either, and may be dealt with,

(continued)

only in the district where the "gist of the offense" occurs, id., at 76, and concluded that the offense of failing to file a required immigration statement was committed only where the filing was to have occurred, the District of Columbia, and not from where the filing was due, the State of Washington. Id. at 79.

The Court amplified its Lombardo holding in United States v. Anderson, 328 U.S. 699 (1946). Anderson involved a prosecution under the Selective Training and Service Act, 54 Stat. 885, 894, 50 U.S.C. App. § 311, for refusal to submit to induction. In Anderson, a draft board in Spokane, Washington, issued an order for Mr. Anderson to report for induction to Fort Lewis, Washington. Mr. Anderson reported to Fort Lewis, but refused to take the required oath and returned to Spokane. The statute involved in Anderson did not have any specific venue provision. The Court found that: "the locus delicti must be determined from the nature of the crime alleged and the location of the act or acts constituting it." Id. at 703.

In holding that the district court for the district in which Fort Lewis is located had jurisdiction over the offense the Court reasoned:

> The places of residence, of the draft board's location, of final and complete performance, all may be situated in districts different from that where the criminal act is done. When they so differ it is the latter, not any of the former, which determines the jurisdiction.

Id. at 705. Thus, the situs of the criminal act is the most significant factor in determining venue and jurisdiction. We

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> inquired of, tried, determined and punished in either district, in the same manner as if it had been actually and wholly committed therein.

241 U.S. at 77 (quoting § 42 of the Judicial Code (§ 731, Rev. Stat.)).

submit that in capital cases, the situs of the criminal act that justifies the imposition of the death penalty, i.e., the homicide, is the most significant factor in determining venue and jurisdiction.

Because states are considered separate sovereigns for purposes of the Double Jeopardy Clause, jurisdictional issues are even more important when state court jurisdiction is involved rather than federal court venue, particularly when the defendant's life may hinge on the resolution. As a result, this Sixth Amendment protection should be applied to the states through the Fourteenth Amendment because it is a "fundamental principle[s] of liberty and justice which lie[s] at the base of all our civil and political institutions," Powell v. Alabama, 287 U.S. 45, 67 (1932) (quoting Herbert v. Louisiana, 272 U.S. 312, 316 (1926)), and is "basic in our system of jurisprudence." In re Oliver, 333 U.S. 257, 273 (1948). This Sixth Amendment protection is a "fundamental right, essential to a fair trial," Gideon v. Wainwright, 372 U.S. 335, 343-344 (1963); Pointer v. Texas, 380 U.S. 400, 403 (1965), which is "fundamental to the American scheme of justice." Duncan v. Louisiana, 391 U.S. 145, 149 (1968). This would preclude the possibility of multiple prosecutions being undertaken solely for the purpose of securing a death sentence.

At common law, only the state which was the situs of the crime had jurisdiction over the crime. This strict territorial concept of jurisdiction is retained in the Restatement (First) of Conflict of Laws § 425 (1934), which provides: "[a] state has no jurisdiction to make an act or event a crime if the act is done or the event happens outside its territory." This territorial jurisdiction has been expanded to encompass extraterritorial

conduct in only a few very limited circumstances. For example, jurisdiction has been exercised in the following situations where some of the criminal activity has taken place in another jurisdiction:

1. Where a mortal wound is inflicted outside the forum state and the victim later dies in another state, both states have jurisdiction over the homicide. See, e.g., Simpson v. State, 17 S.E. 984 (Ga. 1893); State v. Justus, 334 P.2d 1104 (N.M. 1959); Miss. Code Ann. § 99-11-21.

2. If an injury is inflicted through an inexorable force which is set in motion in one state and finds its target in another state, again both states have jurisdiction over the crime. E.g., State v. Hall, 19 S.E. 602 (N.C. 1894).

3. Where conduct occurring within a state is sufficient to constitute an attempt of the proscribed conduct that ultimately occurs outside the state, jurisdiction may lie with either state. See generally George, Extraterritorial Application of Penal Legislation, 64 Mich. L. Rev. 609, 622-23 (1966); Model Penal Code § 1.03 (master ed. 1974).

Historically these bases for extraterritorial jurisdiction have been narrowly construed by courts strongly oriented in favor of the territorial principle. For example, the California Supreme Court has determined that even the crime of conspiracy (a crime that requires very little activity within the forum for jurisdiction to lie) cannot be committed if the contemplated activity is completed outside the state. People v. Buffum, 256 P.2d 317 (Cal. 1953). In Buffum, the court held that the California criminal law did not cover persons who transported pregnant women from their homes in California to Tijuana, Mexico, where criminal abortions were performed. The court held that

enough of the crime had to be done in California to constitute an attempt, and that transportation alone is not enough to constitute attempted abortion. Id. at 320-21. Further, the court specifically held that conspiracy would not lie if the sole objective of the agreement was a violation of Mexican law. Id. at 322.

Similarly, this rule in Buffum was elaborated upon in State v. Domer, 204 N.E.2d 69, 72 (Ohio Ct. App. 1964).

> [D]riving the deceased even to a predetermined place for the purpose of causing his death . . . would constitute mere preparation and until some act which goes further than preparation, and which act or acts, unless interrupted would accomplish the criminal purpose no criminal act would have been committed.

Id. at 75.

In deciding that venue for capital murder was not proper in a county through which the defendant may have driven the victim, the Ohio Court of Appeals held:

> The action must be brought in the county in which the force which is directed at the decedent with intent to kill originated if it is not thereafter interrupted before its contact causes death, or in the county where such unlawful force causes the unlawful death of the decedent, if such be the fact.

Id. at 74.

Thus, even though the strict territorial basis for state court jurisdiction has been expanded somewhat, these exceptions are very narrowly construed. Applying the logic of Buffum and Domer, to the case at bar, it is clear that the force directed at the decedent with intent to kill (the bullet) was launched in Sumter County, Alabama, and the contact that caused the death occurred in Sumter County as well, and the mere transportation of the decedent from Mississippi to Alabama was merely antecedent to

the homicide and as such was not a sufficient basis on which to predicate either venue or jurisdiction.

Although it is true that all of the cited authorities may be distinguished from the case at bar, this is so only because this is a case of first impression. There are many cases involving homicides where the offense was committed in more than one county. These cases, however, are contradictory, compare, e.g., Simms v. United States, 248 F.2d 626 (D.C. Cir.), cert. denied, 355 U.S. 875 (1957) and United States v. Guiteau, 1 Mackey 498 (Dist. Col. 1882) with Pickle v. State, 345 So.2d 623 (Miss. 1977) and People v. Thorn, 21 Misc. 130, 47 N.Y.S. 46 (1897) aff'd 50 N.E. 947 (N.Y. 1898); see generally, Annot., 73 A.L.R.3d 907, and in any event shed no light on the issue involved in this case. Whereas in the county-to-county homicide cases the defendant is tried under the same substantive law, in state-to-state cases the law may vary in substantial respects.[5/]

5/ Indeed, in this case the capital murder statutes in Mississippi and Alabama differ in material respects and it is not at all clear that Mr. Pruett could have been convicted of capital murder in Alabama.

The Alabama capital offense statute provides, in part, as follows:

> (a) The following are capital offenses:
>
> (1) Murder by the defendant during a kidnapping in the first degree or an attempt thereof committed by the defendant.

Ala. Code § 13A-5-40 (1975). Alabama defines first degree kidnapping as follows:

> (a) A person commits the crime of kidnapping in the first degree if he abducts another person with intent to . . . [i]nflict physical injury upon him, or to violate or abuse him sexually . . . .
>
> (b) A person does not commit the crime of kidnapping in the first degree if he

(continued)

We have been unable, however, to uncover a single case in which a homicide that occurred in State A was tried in State B because an antecedent felony had occurred in State B. The case that most closely parallels the facts of this case is Archibald v. State, 362 P.2d 721 (Nev. 1961). In Archibald, the defendant robbed a service station attendant, kidnapped the attendant and took him across the state line to Nevada, where the defendant killed the attendant.6/ Several weeks later, the defendant was

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voluntarily releases the victim alive, and not suffering from serious physical injury, in a safe place prior to apprehension.

Id. § 13A-6-43 (1975).

Thus, were the petitioner tried for capital murder in Alabama, in addition to the state having to prove that the homicide occurred in the course of a kidnapping, the state would also have had to prove: (1) that the kidnapping was conducted with the intent to injure or sexually abuse Mrs. Lowe, and (2) that she had not been released unharmed and in a safe place prior to apprehension. With regard to the first additional element, the record is devoid of evidence that there was such intent (indeed, all of the evidence specifically refutes any intent to injure). With regard to the second additional element -- no release unharmed -- the trial court in its opinion on jurisdiction specifically found that Mrs. Lowe was released unharmed. "The defendant has specifically stated that he released the victim alive just inside the State of Alabama and subsequently changed his mind and returned to slay her." (R. 54).

Thus, had Alabama tried the petitioner for the homicide which occurred within its borders, it is less likely that he would have been convicted of capital murder. Instead, however, Mississippi prosecuted the Alabama homicide under a tenuous legal fiction and was unencumbered by the statutes of the forum of the crime. The laws of this country discourage civil litigants from "forum shopping" to obtain the benefits of the laws of a particular jurisdiction. To permit the state, however, to forum shop in quest of a death sentence is constitutionally repulsive.

6/ The case as reported does not indicate whether, as in the instant case, there was a break in the chain of events where the victim was left unharmed and unattended in Nevada. The facts as reported, however, suggest that there was no break in the chain of events similar to the interruption in this case.

apprehended in Oregon, and was brought back to Nevada where the murder had occurred, not California where the kidnapping began. Although jurisdiction was not raised as an issue in Archibald, petitioner submits that it was not an issue precisely because the accused was tried in the state where the homicide occurred, not in the state where the kidnapping commenced.

Thus, in this case, the state of Mississippi has failed to prove jurisdiction and venue at all, notwithstanding that it was required to prove these elements beyond a reasonable doubt. Presley v. State, 63 So.2d 551, 554-55 (Miss. 1953).

In this case, the only possible basis for jurisdiction is the legal fiction of felony-murder and the fact that the victim was initially abducted from Jackson, Mississippi, even though the petitioner and the victim had come to rest for a period well in excess of fifteen minutes, several hours after the abduction, at least 125 miles from Jackson, and twenty-two miles from the Mississippi border in Sumter County, Alabama. The tensile strength of the felony-murder doctrine is inadequate to withstand the strain of being the sole basis for jurisdiction in this case.

We note at the outset that nothing in this submission challenges the felony-murder rule itself, so long as it is not used as the exclusive basis for a state inflicting capital punishment upon a defendant for a homicide that occurred completely in another state. Nevertheless, to appreciate its significance when it is so used, its background and highly artificial character in general must be recognized.

The criminal law requirement "of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." Dennis v. United States, 341 U.S. 494, 500 (1951) (opinion of Chief Justice Vinson). As has been frequently recognized, the felony-murder rule contradicts this scheme.

> It bases conviction of murder not on any proven culpability with respect to homicide but on liability for another crime. The underlying felony carries its own penalty and the additional punishment for murder is therefore gratuitous -- gratuitous, at least, in terms of what must have been proved at trial in a court of law.
>
> It is true, of course, that the felony-murder rule is often invoked where liability for murder exists on another ground. One who kills in the course of [kidnapping] is almost certainly guilty of murder in the form of intentional or extremely reckless homicide without any need of special doctrine. . . .For the vast majority of cases it is probably true that homicide occurring during the commission or attempted commission of a felony is murder independent of the felony-murder rule. At bottom, continued adherence to the doctrine may rest on assessments of this sort.

Model Penal Code § 210.2 comment at 36-37 (1980).

Although the rule itself remains widespread, "[t]he traditional humanity of modern Anglo-American law," Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 463 (1947) (plurality opinion), has resulted over the past two centuries in an increasing recognition on both sides of the Atlantic that its use to enhance a felon's punishment through strict liability for deaths arising from his felony has no validity where the death penalty is authorized. "Murder is invariably punished as a heinous offense and is the principal crime for which the death penalty is authorized. Sanctions of such gravity demand justification, and their imposition must be premised on the confluence of conduct and culpability." Model Penal Code § 210.2 comment at 36 (1980).7/ In the

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7/ The drafters of the Model Penal Codes are not the only authorities who, in considering felony-murder, have distinguished death from all other penalties imposed for the offense. See, e.g., O. Holmes, Jr., The Common Law 58 (1881) (noting the currency of the felony-murder rule but taking comfort that "[t]he law . . . does not nowadays often inflict death in such cases"); F. Stroud, Mens Rea 173 (1914); Turner, The Mental Element in Crimes at Criminal Law, 6 Cambridge L.J. 31, 65 (1936); Hurst, Criminal Law: The Felony-Murder Doctrine Repudiated, 36 Ky. L. Rev. 106, 108-09 (1946).

case at bar, the confluence of conduct and culpability only occurred in Alabama.

In England, where the felony-murder rule originated, its marriage to the death penalty frequently has been described as an accident of history. See generally 3 J. Stephen, A History of the Criminal Law of England 57-58 (1883) (pointing out that Coke's importation of the capital felony-murder doctrine into more recent English law was based on a misreading of Bracton, since Bracton "[did] not say that [felony-murder] was . . . punishable with death"). At earliest common law, all felonies except petty larceny were capital crimes, but neither attempts nor accidental killings were punishable at all. When the felony-murder rule arose, it served the single purpose of allowing the same penalty to be exacted for foiled felonies resulting in accidental homicide as the law already provided for all accomplished felonies, i.e., death. R. Perkins, The Criminal Law 44 (1969). Thus, while bridging a gap in the substantive law of crimes, it exposed the putative felon to no different dimension of punishment than was commonplace, indeed virtually inevitable, for the felony he attempted. Since "it was immaterial whether a man was hanged for one felony or another," Powers v. Commonwealth, 61 S.W. 735, 741 (Ky. 1901), the rule had no seriously anomolous effect until the death penalty was abolished for most non-homicidal felonies in the 1830's. See generally, Woodson v. North Carolina, 428 U.S. 280, 289 (1976).

In Enmund v. Florida, 102 S. Ct. 3368 (1982), this Court reversed the judgment of the Florida Supreme Court upholding the death penalty because the sentence had been imposed without proof that Earl Enmund had either killed, attempted to kill or intended or contemplated that life would be taken. Id. at 3377. Thus, in

order for a state to impose the death penalty under the felony-murder rule without violating the the Eighth and Fourteenth Amendments the state must prove that the defendant possessed an intent that life be taken. Id.; see also State v. Smith, 591 P.2d 664, 668 (N.M. 1979). Although in this case the element of intent may have been satisfied, the uncontroverted evidence is that if it was present at all,[8/] it did not arise until the petitioner and the victim were at rest in Alabama.

The only evidence of intent introduced at trial establishes that at no point prior to the homicide did Marion Pruett intend to kill. (R. 948, 967). After the hostage was taken, the defendant intended to put her in the trunk of her car and leave her unharmed in the trunk of the car in the parking lot. (R. 963-64). When this plan was thwarted because a police officer was present in the parking lot, having responded to the bank's alarm, (R. 964), the petitioner and the victim drove 125 uninterrupted miles until they came to rest in Sumter County, Alabama. (R. 815). In Sumter, Alabama, Marion Pruett again manifested his intent to release the victim unharmed. They approached an apparently abandoned house where he was going to leave her. (R. 922, 961). Dogs started barking, however, and they got back into the car and drove further down the road to a wooded area. Marion Pruett then left her in the wooded area, went approximately 100-150 feet back to the car, (R. 967) and intravenously injected cocaine and methadrine in an ether base. Approximately fifteen minutes later the petitioner returned to

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8/ Although Mr. Pruett had intravenously injected cocaine and methadrine with an ether base just prior to the homicide which may have precluded the requisite intent from ever having been formed, we are not seeking certiorari on the issue. (R. 923).

the wooded area and saw the victim attempting to leave the area. (R. 923, 967). It is only at this point that petitioner formed the intent to kill. (R. 923, 967).

Thus, not only did the homicide completely occur in Alabama, but the mental state that is constitutionally required to impose the death penalty never was present in Mississippi. Marion Pruett neither killed nor attempted to kill nor intended or contemplated that life would be taken at any point during his activities in Mississippi.

We submit that in order for the death penalty to be constitutionally imposed for felony-murder, there must be a greater nexus between the homicide and the jurisdiction imposing the death sentence than is present in this case. Here, the homicide is too attenuated from Mississippi in terms of time, place, manner, and mental state to permit Mississippi jurisdiction. It is only through the legal fiction of the felony-murder rule that Mississippi is poised to execute Marion Pruett.

The only nexus that Mississippi has to the homicide is that it was the situs for the preceding kidnapping. The primary criminal act upon which the death sentence in this case rests, however, is the homicide, not the kidnapping. Indeed, it would violate the Eighth, and Fourteenth Amendments if Marion Pruett's death sentence were premised solely on the kidnapping. Eberhart v. Georgia, 433 U.S. 917 (1977) (per ciruam) (summarily reversing death sentences for kidnapping). Thus, it would be a constitutionally impermissible quirk of the law to permit Mississippi to impose a death sentence for a homicide that occurred outside of its borders, when none of the activity that occurred within its borders would justify this sanction so "unique in its severity and its irrevocability." Gregg v. Georgia, 428 U.S. at 187. As discussed above, "the confluence of conduct and culpability,"

Model Penal Code § 210.2 comment at 36 (1980), that must underlie such a grave sanction occurred only in Alabama, and not in Mississippi. Permitting Mississippi jurisdiction over this homicide is simply stretching the artificial felony-murder doctrine beyond its constitutional breaking point.

C. THE EVIDENCE AT TRIAL UPON WHICH THE MISSISSIPPI COURT BASED ITS JURISDICTION UNDER THE FELONY-MURDER DOCTRINE ESTABLISHED THAT THE KIDNAPPING HAD COME TO AN END PRIOR TO THE HOMICIDE

Even if the felony-murder doctrine provided a sufficient basis for Mississippi to assume jurisdiction over a homicide that occurred totally in Alabama, Mississippi over a homicide did not have jurisdiction in this case because the underlying kidnapping had come to an end prior to the homicide. Petitioner asserts that the killing of the victim in this case was not committed during the course of the underlying felony of kidnapping that began in Mississippi, but rather the homicide was a new crime commenced after the kidnapping had ended. Further, this new crime of homicide commenced and was consummated totally in Alabama.

The trial testimony established that the petitioner left the victim unattended in a wooded area for approximately fifteen minutes. (R. 923, 967). The State's exhibit clearly established that the petitioner was approximately 186 feet away from the decedent during this fifteen minute interval. States Exhibit No. 30, (R. 865). The testimony established that the area where deceased was located was a wooded area and that the petitioner would have been unable to see the decedent and she would not have been able to see him during the fifteen (15) minutes.

Thus, the evidence adduced at trial indicates that there was a temporal, physical, and visual break in the underlying

felony which gave rise to the capital indictment. Therefore, the homicide which occurred was committed completely and totally in Alabama and not as part of a felony which began in Mississippi. Indeed, the Mississippi trial found as much in holding that Mississippi had jurisdiction. Deterred by the possibility that Alabama might not be able to assert jurisdiction of capital murder, the trial judge held:

> "The defendant has specifically stated that he released the victim alive just inside the State of Alabama and subsequently changed his mind and returned to slay her."

(R. 54). Thus, the kidnapping which was commenced in Mississippi came to a conclusion in Alabama with the victim being released unharmed. Subsequently, however, a new crime of homicide occurred in Alabama. Mississippi did not have jurisdiction over this homicide.

D. Summary

This case presents this Court with a novel and crucial question of the criminal jurisdiction of state courts. There is no constitutional, statutory, or common law basis for the assertion of jurisdiction by the Mississippi courts in this case. The only conceivable basis for the jurisdiction of the Mississippi courts in this case is a strained application of the felony-murder rule. This artificial doctrine does not outweigh the significant infringement on the Sixth, Eighth and Fourteenth Amendments that the exertion of jurisdiction by the Missisppi courts in this case entails, and in any event is not applicable in this case. Because of the importance of these issues, and the fact that petitioner stands to be executed because of them, this Court should grant a writ of certiorari to resolve them.

II. MARION PRUETT'S DEATH SENTENCE WAS THE PRODUCT OF A SENTENCING PROCESS SO IRRATIONAL AND UNGUIDED AS TO RENDER HIS SENTENCE CONSTITUTIONALLY UNRELIABLE

A. Introduction

Petitioner's death sentence raises issues about the use and misuse of statutory aggravating circumstances that go to the heart of this Court's concern, under the Eighth and Fourteenth Amendments, that the death penalty be imposed under conditions that are as rational and circumscribed as is possible. Mr. Pruett's sentencing jury was permitted to base their verdict both upon an overbroad application of one statutory aggravating circumstance and on a wide range of factors that fall outside of the aggravating circumstances set forth by the Mississippi legislature. A sentencing process such as this simply does not offer sufficient protections to insure that the jury will reach a reasoned decision about whether a man is to live or die.

Mr. Pruett's death sentence rests on two constitutionally impermissible bases. First, petitioner's sentence is the product of an inflammatory and highly prejudicial closing argument by the prosecutor, which was rife with pleas to the jury to consider factors clearly falling outside of the statutory aggravating circumstances defined in the Mississippi death penalty law.[9/]

9/ Mr. Pruett's jury rested its death sentence on five of the eight statutory aggravating circumstances provided for in Mississippi's death statute, see note 2, infra, including: that the defendant was previously convicted of another capital offense or of a felony involving the use or threat of violence to the person (here, armed robbery); that the defendant knowingly created a great risk of death to many persons; that the capital offense was committed while the defendant was engaged in the commission of, or flight after committing, a kidnapping; that the capital offense was committed for the purpose of avoiding or preventing a lawful arrest; and, that the capital offense was especially heinous, atrocious or cruel. (R. 1111). While at least two of these aggravating circumstances appear clearly from (continued)

Second, his sentence is based on a severely overbroad, and thus unconstitutional, application of the Mississippi statutory provision which permits the sentencing jury to consider whether the crime committed was "especially heinous, atrocious or cruel."10/ These two errors below -- an overbroad application of a statutory aggravating circumstance and the argument to the jury of non-statutory aggravating circumstances are so inextricably

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the record (that the crime was committed in the course of a kidnapping was, of course an element of petitioner's felony-murder conviction, and evidence was adduced that the petitioner had previously been convicted of armed robbery) petitioner will argue in Part D that the intermixture of unconstitutional with permissible aggravating circumstances undermined the reliability of his death sentence.

10/ Mississippi's death penalty statute provides for the jury's consideration of aggravating and mitigating circumstances in the sentencing phase of a bifurcated trial. The statutory aggravating circumstances are limited to whether:

(a) The capital offense was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital offense or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital offense was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, aircraft piracy or the unlawful use or detonation of a bomb or explosive device.

(e) The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital offense was committed for pecuniary gain.

(g) The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital offense was especially heinous, atrocious or cruel.

Miss. Code Ann. § 99-19-101(5)(Supp. 1982).

intertwined with the final verdict of death that, despite the presence of certain permissible aggravating circumstances, the jury's verdict cannot be allowed to stand under the Eighth and Fourteenth Amendments to the Constitution of the United States.

B. The Jury's Exposure To Evidence And Argument Regarding Factors Not Falling Within Any Of The Enumerated Statutory Aggravating Circumstances Renders The Death Sentence Constitutionally Unreliable

Petitioner's death sentence is unconstitutional because the jury was permitted to hear evidence and argument that ranged far afield from a discussion of the statutory aggravating circumstances appearing in the Mississippi death statute.[11/] The purpose of the legislative enumeration of aggravating circumstances is rendered nugatory by a sentencing process in which the prosecution may introduce, through testimony[12/] and inflammatory rhetoric, information that is not approved for the jury's consideration by the capital sentencing statute.

11/ See note 2 supra.

12/ The jury was allowed to hear testimony by a prison guard that Mr. Pruett had told a fellow inmate that he had "eleven more places to go" and in one, someone would make a mistake and make his escape possible. (R. 1061-62) This testimony should not have been allowed, as the only statutory aggravating circumstances in the Mississippi law which contemplate the jury's consideration of the defendant's other criminal activities are (a) and (b). See note 2 supra. The first permits the jury to consider whether the capital offense was committed by a person under sentence of imprisonment. Miss. Code Ann. § 99-19-101(5)(a) (Supp. 1982). The jury was not permitted to consider this aggravating circumstance, the trial judge having rejected it as clearly inapplicable in Mr. Pruett's case. (R. 1066-67). The second permits the jurors to consider whether the defendant was previously convicted of another capital offense or felony involving the use or threat of violence to the person. Miss. Code Ann. § 99-19-101(5)(b). While petitioner's jury was permitted to consider this factor, (R. 1067) this provision is, on its face, limited to past crimes.

It is impossible to read even one page of Prosecutor Peters' argument to the jury at the close of the sentencing phase of Mr. Pruett's trial without encountering highly prejudicial references to factors that are not found in the Mississippi death penalty statute, including references to Mr. Peter's belief that:

-- A life sentence for Mr. Pruett would result in his release and allow him to commit further crimes. (R. 1097).

-- Jesus Christ approves the death sentence and that, therefore, all Christians may approve it also. (R. 1098).

-- Mr. Pruett's prison minister was conned by him into thinking that he had received Christ; that his religious conversion was a sham engineered solely to obtain a lesser sentence. (R 1099).13/

-- By not imposing the death sentence, the jury would not be "following the law." (R. 1100).

-- Mr. Pruett would, if sentenced to life imprisonment, inevitably escape. (R. 1100).

-- A death sentence for Mr. Pruett would send a signal to every criminal in the state and effectively deter future crime. (R. 1101).

13/ In his closing argument, the prosecuter improperly expressed his personal opinion as to the credibility of one of defendant's witnesses. According to the prosecution, a lay minister who had counseled Pruett in prison had been duped and could therefore not be believed when she testified about the defendant's religious conversion: "And with all due respect to that little girl that came in here as a minister, she got conned . . . ". (R. 1099). A prosecutor must confine his opening statement and closing argument to admissible evidence on the record and permissible inferences from that evidence. In addition, the prosecutor must not offer personal opinions concerning the credibility of witnesses or the guilt of the defendant. United States v. Rios, 611 F.2d 1335 (10th Cir. 1979); Project, Criminal Procedure, 70 Geo. L.J. 701 (1981). The error inherent in the prosecution's expression of personal views is compounded because it affected the consideration of mitigating circumstances. A capital jury must consider any evidence negating the appropriateness of a death sentence. Eddings v. Oklahoma, 455 U.S. 104 (1982).

-- The petitioner should get a death sentence because of the suffering of the victim's child and the fact that the victim would never see her grandchild. (R. 1101-1102).

-- Mr. Pruett would commit further crimes if given a life sentence. (R. 1103).

-- The jury should put themselves in the place of the victim and of the defendant's future victims to effectively evaluate the need for a death sentence. (R. 1104-1105).

-- A death sentence was necessary if the jury was to carry out its "patriotic duty" to enforce the law. (R. 1106).

-- A death sentence was warranted as otherwise the jurors, as taxpayers, would have to pay to support Mr. Pruett for life. (R. 1107).

-- Mr. Pruett would kill his own attorney if given an opportunity. (R. 1108-1109).

These repeated references to petitioner's statements about his future behavior, the implication that a life sentence would insure that the petitioner would be able to carry out these intentions, and the frightening appeals to the jurors to place themselves in the victim's shoes[14/] simply have no place in a legal system that seeks to insure that death sentences are imposed in a reasoned way.

The appeals to the jury made by the prosecutor in this case are nearly identical to those held unconstitutional in Hance v.

14/ The prosecutor argued, for example, that

> [T]he next time you read about some clerk in a store getting kidnapped and murdered and made to undress in a desolate area and made to lay down so you can be shot in the back of the head while you're telling the murderer how to get you help; how to contact your family, when you read about that, don't say 'they oughta kill that guy.' Don't say, 'the law oughta take that man into their own hands and do something about him. "You say, [if you refuse to sentence Mr. Pruett to death] I had my chance and I missed it."

(R. 1104-1105)(emphasis added).

Zant, 696 F.2d 940 (11th Cir. 1983). In that case, the prosecutor improperly stirred up the fears of the jury by trying to convince them that no one could feel safe while the defendant was in prison. In Hance, as in Mr. Pruett's case, improper appeals were made to the patriotism of the jury, exhorting them to join in the war against crime. Finally, the prosecutor asked the jury to seize the opportunity and strike out against crime: "Well, it's time for somebody to do something . . . . You're in the batter's box, so to speak . . . it's a matter of fish or cut bait, because we're right down to it." Id. at 952. The import of this language, which is specifically designed to incite passions at the expense of reason, is nearly identical to the language used by Prosecutor Peters in his closing arguments to the jury regarding Mr. Pruett. The court's finding in Hance is thus applicable here:

> This dramatic appeal to gut emotion has no place in the courtroom, especially in a case involving the penalty of death. A sentence of death imposed after such an appeal cannot be carried out. The sentencing hearing in this case was fundamentally unfair and therefore constitutionally intolerable.

Id. at 952-53.

The court then concluded that the prosecutor's inflammatory remarks were deliberate, extensive, and highly prejudicial to the accused. Id. at 953.

The interjection of these appeals to the jury through the prosecutor's closing argument is also at odds with the express wording of the Mississippi death penalty statute. That statute, quite properly, contemplates that criminal propensities and appeals to the jurors' passions will not fall within the rubric of the statutory aggravating circumstances. The Mississippi statute specifically limits the aggravating circumstance to those

enumerated. Miss. Code Ann. § 99-19-101(5) (Supp. 1982). This Court's opinions assume that the state's death penalty statutes will be applied so as to limit the jury's consideration to these enumerated aggravating circumstances. They further clearly require such limitations as necessary to insure effective appellate review of a death sentence. Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976). As the Eleventh Circuit succinctly stated in Goode v. Wainwright, 704 F.2d 593 (11th Cir. 1983):

> Implicit in a decision that a particular scheme will likely result in a rational and consistent sentencing is the critical assumption that the state will follow that scheme. Thus, the failure to abide by that scheme can result in the arbitrary imposition of the death penalty in violation of the Eighth Amendment.

Id. at 610 n.19.

Under the circumstances of Mr. Pruett's case, no effective limits were placed on the jury's discretion and thus no meaningful appellate review could have taken place. There simply is no way in which the reviewing court could know, with the certainty that this Court has historically and consistently required in death penalty cases, that the jury, in reaching its decision about petitioner's sentence, did not rely primarily on the non-statutory aggravating factors urged on it by the prosecutor. The Eleventh Circuit further noted in Goode:

> [T]he Eighth Amendment requirements of consistency and nonarbitrariness are the predicate and raison d'etre of the Florida rule that nonstatutory aggravating circumstances cannot be considered. When that rule is ignored and nonstatutory circumstances are considered, Eighth Amendment concerns are implicated.

Id. at 609.

This Court's repeated concern that jury discretion be confined and that genuine appellate review of death sentences take place can not coexist with a sentencing process that routinely allows the introduction of extraneous factors to the jury. While prosecutors are traditionally accorded broad latitude in their closing arguments in criminal cases,[15] this latitude is incompatible with the gravity of the death penalty.[16] The closing arguments used by the prosecutor in Mr. Pruett's sentencing trial must be common in death penalty cases throughout the country, see Newlon v. Missouri, 103 S. Ct. 185, 189 (1982) (mem. dec.) (Marshall, Brennan, JJ, dissenting) and will continue to work to the disadvantage of defendants until this Court remedies this intolerable situation by a decisive pronouncement requiring that the evidence and argument in the sentencing phase conform to the statutory limitations it has so carefully nurtured since its decision in Furman v. Georgia, 408 U.S. 238 (1972).

15/ In fact, the Mississippi Supreme Court has sanctioned a prosecutor's arguments which included such appeals as were made in petitioner's sentencing trial. E.g., Coleman v. State, 378 So.2d 640 (Miss. 1979).

16/ The Fifth Circuit focused on this point in Henry v. Wainwright, 661 F.2d 56 (5th Cir. 1981), vac. on other grounds, 457 U.S. 1114, adhered to on remand, 686 F.2d 311 (5th Cir. 1982), stating:

> [P]ermitting the [sentencer] to consider whatever evidence of nonstatutory aggravating circumstances the prosecution might desire to present or the [sentencer] might discern in the testimony opens too wide a door for the influence of arbitrary factors on the sentencing determination . . . . [S]anctioning consideration of statutory aggravating factors plus anything else the [sentencer] determines to be aggravating . . . broadens . . . discretion rather than channels it and obscures any meaningful basis for distinguishing cases in which the death penalty is imposed from those in which it is not.

Id. at 59.

C. The Mississippi Supreme Court Employed An Overbroad Construction Of The Statutory Phrase "Especially Heinous, Atrocious Or Cruel" In Upholding Petitioner's Death Sentence In Violation of The Eighth And Fourteenth Amendments To The Constitution

The Mississippi Supreme Court, in affirming petitioner's death sentence -- a sentence based in part on the jury's finding that the petitioner's crime was "especially heinous, atrocious or cruel" (A. 21-22) -- violated its own case law and clear pronouncements of this Court establishing the constitutional parameters for capital sentencing. This phrase has been regularly attacked in death penalty cases because of its imprecision,[17] and was upheld by this Court in Gregg v. Georgia, 428 U.S. 153 (1976),[18] only with the admonishment that a solution to the imprecision of the statutory language be provided either through limiting instructions to the jury by the trial courts or by state supreme courts as they applied the phrase to the facts of particular cases in reviewing death sentences. Thus, this Court refused to assume in Gregg that this statutory phrase would always be construed unconstitutionally, but warned against its being given an "open-ended construction." Id. at 201 (opinion of Stewart, Powell and Stevens, JJ.).

The statutory phrase specifically applicable to petitioner's case was similarly upheld against an overbreadth attack by the

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17/ E.g., Blake v. Zant, 513 F. Supp. 772 (S.D. Ga. 1981); People v. Superior Court (Engert), 31 Crim. L. Rptr. 2325 (1982); Barclay v. State, 411 So.2d 1310 (Fla. 1981), cert. granted 103 S. Ct. 340 (1982); Hill v. State, No. 53,795 (Miss. May 4, 1983).

18/ Gregg involved this Court's consideration of a statutory aggravating circumstance which actually imparts much greater precision to the phrase "heinous or atrocious" than does the Mississippi statute. The Georgia statute confines the jury's consideration to offenses "outrageously or wantonly vile, horrible or inhuman in that [they] involved torture, depravity of mind, or an aggravated battery to the victim." 428 U.S. 153, 165 n.9 (emphasis added).

Mississippi Supreme Court in Washington v. State, 361 So.2d 61 (1978), cert. denied, 441 U.S. 916 (1979). In Coleman v. State, 378 So.2d 640 (Miss. 1979), decided after Washington, that court provided what the Supreme Court sought in Gregg; a limiting construction on the phrase "especially heinous and atrocious." There the court explicitly adopted the Fifth Circuit's definition of "especially heinous or atrocious"[19] which includes only crimes that are "conscienceless or pitiless" and "unnecessarily torturous to the victim," Id. at 648 (quoting Spinkellink v. Wainwright, 578 F.2d 682 (5th Cir. 1978)).[20]

This limiting construction, required by Gregg and propounded by the Mississippi Supreme Court in cases following Washington, was abandoned by the Mississippi Supreme Court in reviewing petitioner's sentence. Although the Mississippi

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19/ After Coleman, the Mississippi Supreme Court, for a time at least, consistently applied the "atrocious or heinous" prong as set forth in Spinkellink, until its decision in petitioner's case. See Reddix v. State 381 So.2d 999 (Miss.), cert. denied 449 U.S. 986 (1980) (elderly man beaten to death with iron wrench found atrocious and cruel); Jones v. State, 381 So.2d 983 (Miss.), cert. denied 449 U.S. 1003 (1980) (same); Culbertson v. State, 379 So.2d 499 (Miss. 1979) (victim beaten with stick and shot while begging for mercy found atrocious and cruel); Voyles v. State, 362 So.2d 1236 (Miss. 1978), cert. denied 441 U.S. 956 (1979) (woman beaten, run over twice with car and thrown in creek found atrocious and cruel).

20/ Under the Mississippi statute, the Mississippi Supreme Court is required to automatically review the death sentence to determine:

> (a) Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor;
>
> (b) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 99-19-101; and
>
> (c) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.
>
> Miss. Code Ann. § 99-19-105(3) (Supp. 1982).

Supreme Court asserted that it had carefully examined the evidence to determine whether it supported the jury's finding of the statutory aggravating circumstances relied upon to sentence Mr. Pruett to death (A. 21-22),[21] any reading of the record demonstrates that the crime committed clearly does not fall within this statutory provision.

Mrs. Lowe's murder, tragic and senseless as it was, simply does not qualify as one which is especially heinous or atrocious under the standard set forth by the Mississippi Supreme Court. The record demonstrates that she did not fear for her life (R. 815) and that she was unaware of her impending death even at the moment of its execution. (R. 967). Further, her death was caused by a single bullet through the stem of her brain and was virtually instantaneous. The lack of terrified anticipation and the absence of battery or prolonged physical suffering prior to death places this murder, while deeply regrettable, outside of the category of crimes that may be considered "heinous" or "atrocious" under Mississippi law and under the Fourteenth and Eighth Amendments to the United States Constitution.

In Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982), a case with facts virtually identical to the instant case, the Eleventh Circuit agreed with the contention that the judge's finding that the crime appellant had committed was especially heinous, atrocious or cruel under the Florida death penalty statute was unsupported by the evidence in the record. Id. at 1261. This case sets forth the parameters for the application of

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21/ Further, the jury was not given the limiting instruction required by the Mississippi Supreme Court in Coleman, 378 So. 2d 640 and required by the Supreme Court in Godfrey v. Georgia, 446 U.S. 420, 429 (1980).

this aggravating circumstance to the particular facts of each case.

The Eleventh Circuit stressed that the phrase, as construed by the Florida Supreme Court (a construction which has, as noted above, also been adopted by the Mississippi Supreme Court) requires "acts of physical harm or torture to the murder victim prior to or accompanying the act resulting in death," id., and that the Florida Supreme Court had never applied it to "killings accomplished quickly by acts of shooting or stabbing involving no additional torturous acts to the victim. " Id. at 1264. The circuit court thus refused to apply this aggravating circumstance to Mr. Proffitt's crime where "there was no evidence that appellant perpetrated any physical act on the victim other than the single stab wound in the chest that resulted in his death." Id. Similarly, this phrase can not be applied to Mr. Pruett's case in which the victim's death was rapid and involved no torture or other physical act prior to the gunshot wound.

In Godfrey v. Georgia 446 U.S. 420 (1980), this Court reversed a death sentence based solely on the heinousness of the crime involved, because the murder committed by the petitioner did not "[reflect] a conciousness materially more 'depraved' than that of any [other] person guilty of murder," and because this statutory aggravating circumstance had been applied so as to make it impossible to distinguish that case from many other cases in which the death penalty had not been imposed. Id. at 483. There the death sentence was reversed despite evidence of much greater suffering experienced by the victim than was experienced by Mrs. Lowe, as the victim witnessed the bloody and gruesome death of her daughter, knowing that her own death was imminent. Id. at 450-51 (White, J., dissenting). To apply this phrase as it has

been applied to Mr. Pruett would accomplish the result forbidden by Gregg: An open-ended construction of "heinous or atrocious" which allows any murder to fall within its scope.

The Mississippi Supreme Court's application of this statutory aggravating circumstance to the instant case makes a mockery of the carefully conceived system of limited jury discretion and close appellate review of death sentences that has been developed by this Court and echoed by the state supreme courts in applying their states' death penalty statutes. In Jackson v. State, 337 So.2d 1242 (Miss. 1976), the Mississippi Supreme Court set forth the rules by which its state's juries and the Court itself would be guided in death penalty cases, rules which it has abandoned here without rationalizing this result with its prior cases and with the requirements of Gregg and Godfrey.[22/]

D. The Jury's Improper Consideration Of Unconstitutional Aggravating Circumstances And The Overbroad Application Of One Statutory Aggravating Circumstance Rendered The Sentencing Decision Constitutionally Unreliable

Petitioner's death sentence is, as demonstrated above, based in part both on the unconstitutional application of statutory

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22/ The result in petitioner's case decisively demonstrates the vagueness of this phrase and the impossibility of applying it with any precision. Prior narrow constructions of the phrase by the Mississippi Supreme Court, inexplicably gave way in this case to a construction which equates any murder with an atrocious or heinous crime. Similar inconsistencies in applying this phrase appear in the Florida Supreme Court's encounters with the analogous provision in the Florida death statute. These problems are exhaustively detailed in the petitioner's brief to this Court in Barclay v. Florida, No. 81-6908 at 53 n.17 (filed January 3, 1983). The Supreme Court of California summarized these problems when it last year declared the provision of California murder statute making the heinousness or atrociousness of the crime an aggravating circumstance void for vagueness saying that the words had "no directive content." People v. Superior Court (Engert), 31 Crim. L. Rptr 2325 (1982).

aggravating circumstances and the impermissible argument to the jury of non-statutory aggravating circumstances. These factors could only have served to draw the jury's attention from the specific task it had at hand: the consideration of carefully delineated statutory aggravating circumstances.

While the jury may have also rested its judgment in form on statutory aggravating circumstances which appear to be supported in the record,[23] no appellate court can now discern the extent to which the jury's decision was, for example, so colored by the lurid picture of escape and reprisal drawn by the prosecutor as to render the jury's findings constitutionally unreliable.[24] Efforts to limit the jury's consideration of aggravating circumstances to those specified in a death statute will prove meaningless if verdicts rendered under the conditions found in Mr. Pruett's sentencing phase are allowed to stand.

This point has been made forcefully in two recent decisions by courts within the Fifth Circuit. In Blake v. Zant, 513 F. Supp. 772 (S.D. Ga. 1981), the district court reviewed a Georgia Supreme Court decision which upheld a death sentence despite the constitutional errors in the trial judge's charge with respect to two aggravating factors, because of the presence of another aggravating circumstance clearly warranted by the evidence presented at trial.

23/ See note 1, supra.

24/ This is especially problematical in a statutory scheme such as Mississippi's under which the jury is required to weigh and balance aggravating and mitigating circumstances. Miss. Code Ann. § 99-19-101(3) (Supp. 1982). There is no way of telling now whether the aggravating circumstances supported by the record would have been outweighed by mitigating circumstances had the jury not also been exposed to the prosecutor's improper closing argument.

The district court reversed the Georgia Supreme Court, squarely holding that

> [T]he removal of a specific factor...might well alter a jury's ultimate determination of death, which is after all the subject of appellate review. . . . This Court concludes that...the important question is not whether the jury could have imposed death without the improper charge, but whether it in fact did impose sentence based in some part on this consideration. More particularly, the Court must consider whether "substantial risk" of unguided discretion was created and whether "rational" appellate review was thereby precluded.

Id. at 801 (emphasis added).[25/]

Similarly, in Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980), modified 648 F.2d 446, cert. granted, 454 U.S. 814 (1981), the Fifth Circuit reversed a death sentence, which was based on four statutory aggravating circumstances, one of which was later declared unconstitutional. The Fifth Circuit based its reversal on cases decided by this Court spelling out the importance of complete reliability in death penalty cases, saying that:

> Furman v. Georgia . . . held that the death penalty may not be imposed under sentencing procedures that create a substantial risk that the penalty will be inflicted in an arbitrary and capricious manner. The Constitution requires that the sentencer's discretion be channeled by clear and objective standards that "make rationally reviewable the process for imposing a sentence of death" [quoting Woodson v. North Carolina].
>
> It is impossible for a reviewing court to determine satisfactorily that the verdict in

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25/ The district court also noted that the premise underlying this Court's decision in Gregg upholding the Georgia death penalty statute was that it would be properly applied. 513 F. Supp at 801. The court went on to reason that Gregg thus raised statutory errors by a state appellate court to constitutional dimensions, and that an error under state law would create the substantial risk of arbitrariness in sentencing which Furman and subsequent Supreme Court cases seek to prevent. Id.

> this case was not decisively affected by an unconstitutional statutory aggravating circumstance . . . . It is possible that even if the jurors believed that the other aggravating circumstances were established, they would not have recommended the death penalty but for the decision that the offense was committed by one having a substantial history of serious assaultive criminal convictions, an invalid ground. The presence of the unconstitutionally vague circumstance also made it possible for the jury to consider several prior convictions of petitioner which otherwise would not have been before it. The instruction on the invalid circumstance may have directed the jury's attention to those convictions.

631 F.2d at 16 (citations omitted).

These decisions, with which the Mississippi Supreme Court's decision in Edwards v. State, No. 53,800 (Miss. March 16, 1983) (upholding death penalty where one of several statutory aggravating circumstances on which it is based is invalid) is in direct conflict, clearly comport with this Court's concern that the "qualitative difference" under the Eighth Amendment between death and any other criminal punishment requires a "corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. at 305. See also, Beck v. Alabama, 447 U.S. 625 (1980); Lockett v. Ohio, 438 U.S. 586 (1978). Petitioner's case thus presents facts identical to those raised in the 5th Circuit's opinion in Stephens v. Zant. This Court considered those issues sufficiently important to warrant granting a writ of certiorari to the Fifth Circuit to review its decision in that case.[26/]

26/ This issue is also implicated in this Court's grant of certiorari to the Supreme Court of Florida to review its decision in Barclay v. State, 411 So.2d 1310 (Fla. 1981), cert. granted, 103 S. Ct. 340 (1982).

In sum, the manner of imposition of petitioner's death sentence raises compelling constitutional issues left unanswered by this Court's decisions in Furman, Gregg and Godfrey. These issues involve important decisions about the limitations that must be placed upon the imposition of the death penalty in order to insure that no one will be sentenced to die without the restrained and careful consideration befitting this grave and irrevocable penalty. Because of the importance of these issues to the administration of death penalty schemes consonant with the Eighth and Fourteenth Amendments, this Court should resolve them through its review of petitioner's death sentence.

CONCLUSION

For all the foregoing reasons, Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Mississippi.

Respectfully submitted,

Steven B. Bright/jmh
Steven B. Bright
600 Healey Building
57 Forsyth Street, N.W.
Atlanta, Georgia 30303
(404) 688-1202

Attorney Advisor to Petitioner*

Of Counsel:

Richard A. Flye
Jamie M. Bennett
David I. Bookspan
McKenna, Conner & Cuneo
1575 Eye Street, N. W.
Washington, D. C. 20005
(202) 789-7500

Dated: June 14, 1983

* It was Mr. Pruett's original intention to file this petition pro se with the assistance of two inmate legal advisors at Mississippi State Penitentiary and an attorney advisor. However, he has authorized counsel to file this petition on his behalf, because he asserts he has had insufficient time in the law library to prepare his own petition.

APPENDIX

Relevant Mississippi Statutes

§ 97-3-19 Homicide; murder defined; capital murder.

(1) The killing of a human being without the authority of law by any means or in any manner shall be murder in the following cases:

(a) When done with deliberate design to effect the death of the person killed, or of any human being;

(b) When done in the commission of an act eminently dangerous to others and evincing a depraved heart, regardless of human life, although without any premeditated design to effect the death of any particular individual;

(c) When done without any design to effect death by any person engaged in the commission of any felony other than rape, kidnapping, burglary, arson or robbery, or in any attempt to commit such felonies.

(2) The killing of a human being without the authority of law by any means or in any manner shall be capital murder in the following cases:

(a) Murder which is perpetrated by killing a peace officer or fireman while such officer or fireman is acting in his official capacity or by reason of an act performed in his official capacity, and with knowledge that the victim was a peace officer or fireman. For purposes of this paragraph, the term "peace officer" means sheriff of counties and their deputies, constables, marshals and policemen of cities and towns, game wardens, parole officers, a judge, prosecuting attorney or any other court official, agents of the alcoholic beverage control division of the state tax commission, agents of the bureau of narcotics, personnel of the Mississippi Highway Patrol, and the superintendent and his deputies, guards, officers and other employees of the Mississippi State Penitentiary;

(b) Murder which is perpetrated by a person who is under sentence of life imprisonment;

(c) Murder which is perpetrated by use or detonation of a bomb or explosive device;

(d) Murder which is perpetrated by any person who has been offered or has received anything of value for committing the murder, and all parties to such a murder, are guilty as principals;

(e) When done with or without any design to effect death, by any person engaged in the commission of the crime of rape, burglary, kidnapping, arson or robbery, or in any attempt to commit such felonies;

(f) Murder which is perpetrated by the killing of any elected official of a county, municipal, state or federal government with knowledge that the victim was such public official.

§ 99-11-1. Jurisdiction of crimes generally.

The several courts of justice organized under the constitution and laws of this state, shall possess the sole and exclusive jurisdiction of trying and punishing all persons in the manner prescribed by law, for crimes and offenses committed in this state, except such as are exclusively cognizable by the courts deriving their jurisdiction from the constitution and laws of the United States.

§ 99-11-17. Offenses commenced in and consummated out of state.

Where an offense is commenced in this state and consummated out of it, either directly or by the accused or by any means or agency procured by or proceeding from him, he may be indicted and

tried in the county in which such offense was commenced or from which such means or agency proceeded.

§ 99-11-21. Occurrence in one jurisdiction causing death in another.

Where the mortal stroke or other cause of death occurs or is given or administered in one county, and the death occurs in another county, the offender may be indicted and tried in either county; and so, also, if the mortal stroke of cause of death occur or be given or administered in another state or country and the death happen in this state, the offender may be indicted and tried in the county in which the death happened.

§ 99-19-101. Jury to determine punishment in capital cases in separate sentencing proceeding; aggravating and mitigating circumstances to be considered.

(1) Upon conviction or adjudication of guilt of a defendant of capital murder or other capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a jury to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the

aggravating or mitigating circumstances. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or of the State of Mississippi. The state and the defendant and/or his counsel shall be permitted to present arguments for or against the sentence of death.

(2) After hearing all the evidence, the jury shall deliberate on the following matters:

(a) whether sufficient aggravating circumstances exist as enumerated in subsection (5) of this section;

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (6) of this section, which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) For the jury to impose a sentence of death, it must unanimously find in writing the following:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5) of this section; and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (6), to outweigh the aggravating circumstances.

In each case in which the jury imposes the death sentence, the determination of the jury shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) of this section and upon the records of the trial and the sentencing proceedings. If the jury does not make the findings requiring the death sentence, the court shall impose a sentence of life imprisonment.

(4) The judgment of conviction and sentence of death shall be subject to automatic review by the supreme court of Mississippi within sixty (60) days after certification by the sentencing court of entire record, unless the time is extended for an additional period by the supreme court for good cause shown. Such review by the supreme court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) Aggravating circumstances shall be limited to the following:

(a) The capital offense was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital offense or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital offense was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, aircraft piracy or the unlawful use or detonation of a bomb or explosive device.

(e) The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital offense was committed for pecuniary gain.

(g) The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital offense was especially heinous, atrocious or cruel.

(6) Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

§99-19-105. Review by supreme court of imposition of death penalty.

(1) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Mississippi Supreme Court. The clerk of the trial court, within ten (10) days after receiving the transcript, shall transmit the entire record and transcript to the Mississippi Supreme Court together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case,

the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Mississippi Supreme Court, a copy of which shall be served upon counsel for the state and counsel for the defendant.

(2) The Mississippi Supreme Court shall consider the punishment as well as any errors enumerated by way of appeal.

(3) With regard to the sentence, the court shall determine:

(a) Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor;

(b) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 99-19-101; and

(c) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(4) Both the defendant and the state shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

(5) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentence, shall be authorized to:

(a) Affirm the sentence of death; or (b) Set the sentence aside and remand the case for modification of the sentence to imprisonment for life.

(6) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.

Relevant Alabama Statutes

13A-6-43. Kidnapping in the first degree.

(a) A person commits the crime of kidnapping in the first degree if he abducts another person with intent to

(1) Hold him for ransom or reward; or

(2) Use him as a shield or hostage; or

(3) Accomplish or aid the commission of any felony or flight therefrom; or

(4) Inflict physical injury upon him, or to violate or abuse him sexually; or

(5) Terrorize him or a third person; or

(6) Interfere with the performance of any governmental or political function.

(b) A person does not commit the crime of kidnapping in the first degree if he voluntarily releases the victim alive, and not suffering from serious physical injury, in a safe place prior to apprehension. The burden of injecting the issue of voluntary safe release is on the defendant, but this does not shift the burden of proof. This subsection does not apply to a prosecution for or preclude a conviction of kidnapping in the second degree or any other crime.

(c) Kidnapping in the first degree is a Class A felony. (Acts 1977, No. 607, p. 812, § 2210.)

§ 13A-5-40. Capital offenses.

(a) The following are capital offenses:

(1) Murder by the defendant during a kidnapping in the first degree or an attempt thereof committed by the defendant;

(2) Murder by the defendant during a robbery in the first degree or an attempt thereof committed by the defendant;

(3) Murder by the defendant during a rape in the first or second degree or an attempt thereof committed by the defendant; or murder by the defendant during sodomy in the first or second degree or an attempt thereof committed by the defendant;

(4) Murder by the defendant during a burglary in the first or second degree or an attempt thereof committed by the defendant;

(5) Murder of any police officer, sheriff, deputy, state trooper, federal law enforcement officer, or any other state or federal peace officer of any kind, or prison or jail guard, while such officer or guard is on duty or because of some official or job-related act or performance of such officer or guard;

(6) Murder committed while the defendant is under sentence of life imprisonment;

(7) Murder done for a pecuniary or other valuable consideration or pursuant to a contract or for hire;

(8) Murder by the defendant during sexual abuse in the first or second degree or an attempt thereof committed by the defendant;

(9) Murder by the defendant during arson in the first or second degree committed by the defendant; or murder by the defendant by means of explosives or explosions;

(10) Murder wherein two or more persons are murdered by the defendant by one act or pursuant to one scheme or course of conduct;

(11) Murder by the defendant when the victim is a state or federal public official or former public official and the murder stems from or is caused by or is related to his official position, act, or capacity;

(12) Murder by the defendant during the act of unlawfully assuming control of any aircraft by use of threats or force with intent to obtain any valuable consideration for the release of said aircraft or any passenger or crewmen thereon or to direct the route or movement of said aircraft, or otherwise exert control over said aircraft;

(13) Murder by a defendant who has been convicted of any other murder in the 20 years preceding the crime; provided that the murder which constitutes the capital crime shall be murder as defined in subsection (b) of this section; and provided further that the prior murder conviction referred to shall include murder in any degree as defined at the time and place of the prior conviction; and

(14) Murder when the victim is subpoenaed, or has been subpoenaed, to testify, or the victim had testified, in any preliminary hearing, grand jury proceeding, criminal trial or criminal proceeding of whatever nature, or civil trial or civil proceeding of whatever nature, in any municipal, state, or federal court, when the murder stems from, is caused by, or is related to the capacity or role of the victim as a witness.

(b) Except as specifically provided to the contrary in the last part of subdivision (a)(13) of this section, the terms "murder" and "murder by the defendant" as used in this section to define capital offenses mean murder as defined in section 13A-6-2(a)(1), but not as defined in section 13A-6-2(a)(2) and (3). Subject to the provisions of section 13A-5-41, murder as defined in section 13A-6-2(a)(2) and (3), as well as murder as defined in section 13A-6-2(a)(1), may be a lesser included offense of the capital offenses defined in subsection (a) of this section.

(c) A defendant who does not personally commit the act of killing which constitutes the murder is not guilty of a capital offense defined in subsection (a) of this section unless that

defendant is legally accountable for the murder because of complicity in the murder itself under the provisions of section 13A-2-23, in addition to being guilty of the other elements of the capital offense as defined in subsection (a) of this section.

(d) To the extent that a crime other than murder is an element of a capital offense defined in subsection (a) of this section, a defendant's guilt of that other crime may also be established under section 13A-2-23. When the defendant's guilt of that other crime is established under section 13A-2-23, that crime shall be deemed to have been "committed by the defendant" within the meaning of that phrase as it is used in subsection (a) of this section. (Acts 1981, No. 81-178, § 2.)

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1ST CASE of Level 1 printed in FULL format.

Marion Albert Pruett v. State of Mississippi

No. 54,000

Supreme Court of Mississippi, En Banc

Slip Opinion

February 23, 1983

Appeal from Circuit Court, Hinds County; William F. Coleman, Judge.

BOWLING, JUSTICE, FOR THE COURT. WALKER, P.J., AND ROY NOBLE LEE, HAWKINS, DAN LEE, PRATHER AND ROBERTSON, JJ., CONCUR. PATTERSON, C.J., AND BROOM, P.J., CONCUR IN PART, AND DISSENT IN PART.

Binder, Kirksey & DeLaugher, Jackson, Mississippi

William B. Kirksey, Jackson, Mississippi

Alvin M. Binder, Jackson, Mississippi for appellant

Bill Allain, Attorney General, by Bill Patterson, Special Assistant Attorney General Jackson, Mississippi for appellee

BOWLING

BOWLING, JUSTICE, FOR THE COURT:

Appellant Marion Albert Pruett was indicted in the Circuit Court of the First Judicial District of Hinds County for the crime of capital murder. Venue was moved to Lowndes County and in a bifurcated trial, as required by statute and prior decisions of this Court, he was found guilty of the crime at the conclusion of the guilt phase. After presentation of the penalty phase to the jury, it found that appellant should be put to death as the penalty for his crime. On appeal to this Court, appellant assigns four alleged reversible errors as follows:

I. THE LOWER COURT ERRED IN ASSUMING JURISDICTION AND VENUE OVER APPELLANT ON THE CHARGE OF CAPITAL MURDER; IN OVERRULING APPELLANT'S MOTION TO QUASH THE INDICTMENT, DIRECTED VERDICT AND PEREMPTORY INSTRUCTION; AND IN GRANTING THE STATE'S INSTRUCTION S-1.

II. THE LOWER COURT ERRED IN OVERRULING APPELLANT'S MOTION TO SUPPRESS EVIDENCE AND ADMITTING CONFESSIONS INTO EVIDENCE WHICH WERE ELICITED FROM APPELLANT BY PROMISES OF DRUGS FROM AUTHORITIES.

III. THE LOWER COURT ERRED IN SEATING MR. SIDNEY GRAHAM (JUROR # 8) ON THE JURY AND APPELLANT WAS DENIED THE OPPORTUNITY TO EXERCISE PEREMPTORY CHALLENGES IN AN INTELLIGENT AND KNOWLEDGEABLE MANNER BECAUSE OF SAID JUROR'S MISSTATEMENTS DURING VOIR DIRE.

IV. THE LOWER COURT ERRED IN ADMITTING AN EDITED TELEVISION INTERVIEW INTO EVIDENCE AT THE SENTENCING PHASE OF THE TRIAL.

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Appellant was indicted under Mississippi Code Annotated, Section 97-3-19(2)(e) (Supp. 1082), which provides as follows:

(2) The killing of a human being without the authority of law by any means or in any manner shall be capital murder in the following cases: • • •

(e) When done with or without any design to effect death, by any person engaged in the commission of the crime of rape, burglary, kidnapping, arson or robbery, or in any attempt to commit such felonies;

The punishment phase of the bifurcated trial was conducted pursuant to the provisions of MCA § 99-19-101 (Supp. 1982). It should first be noted that no error is assigned because of any alleged failure to follow the provisions of the statute.

The facts of the crime are practically admitted in their entirety, except for one instance; that is, the events immediately prior to appellant shooting the deceased, Peggy Lowe. All underlying occurrences were testified to by appellant as his only witness during the guilt phase of the trial. There is no contention or indication that Pruett was mentally incompetent. In fact, the entire record and history of this particular case, as well as Pruett's prior activities, clearly reveal that he is a very intelligent and crafty person. The circumstances leading to the death of Peggy Lowe were clearly revealed by appellant's sworn testimony at the trial. Early on the morning of September 17, 1981, appellant appeared at the branch office of Unifirst Savings & Loan Association located in the Metrocenter shopping area where Peggy Lowe worked with three other female employees. According to appellant, he picked out this business because no male employees were present, stating that men would be more likely to give him trouble than women. Appellant had stayed the prior night at a motel not very far from the area. The purpose of appellant entering the savings and loan association branch office admittedly was to commit an armed robbery and to take a hostage for the purpose of making his escape. During the progress of the armed robbery, Mrs. Lowe received a call from her son and made an engagement to meet him for lunch. Appellant decided that it would suit his purposes better to take Mrs. Lowe as hostage rather than the other person originally selected.

The armed appellant then took the money and Peggy Lowe to her car and drove to another part of the shopping center. He then placed her in his car, drove around several streets in the area, and then drove to Interstate #20 and approximately 100 miles, without stopping, to Sumter County, Alabama. This county is adjacent to the Mississippi-Alabama state lines. During this entire ride appellant forced Mrs. Lowe to stay on her knees on the floorboard of the passenger front of the car, with her shoulders, arms and head downward on the seat. Whenever passing another vehicle or being passed, appellant would place his coat over Mrs. Lowe so she would not be seen. At one point during the ride, at the request of Mrs. Lowe, appellant permitted her to say a prayer.

After driving into Alabama, appellant left the interstate highway, traveled on a gravel road for a distance and then turned onto a small country road where he stopped. Mrs. Lowe was taken from the car and carried into the woods. According to appellant, he then forced her to disrobe, except for her underclothes. The purpose of this was to keep her under his control so that she would not leave the area. Appellant testified he then went to his car, took a shot of cocaine and went back to check on his prisoner. He found that she had

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moved from the area. He then, by his own sworn testimony, instructed her to get on her knees, put her face down and repeat her husband's telephone number so that he could be called. Mrs. Lowe was in the process of doing this when appellant, according to his sworn testimony, shot her in the back of the head at close range. Appellant then drove away in his car and visited other parts of the country prior to being apprehended.

POINT I. THE LOWER COURT ERRED IN ASSUMING JURISDICTION AND VENUE OVER APPELLANT ON THE CHARGE OF CAPITAL MURDER; IN OVERRULING APPELLANT'S MOTION TO QUASH THE INDICTMENT, DIRECTED VERDICT AND PEREMPTORY INSTRUCTION, AND IN GRANTING THE STATE'S INSTRUCTION S-1.

The underlying contentions of appellant under the issues raised regarding this point are that appellant could not be indicted, tried and convicted for the crime of capital murder because the killing of Mrs. Lowe occurred in the State of Alabama.

Appellant filed a motion attacking the jurisdiction of the Hinds County, Mississippi, court and a hearing was had under stipulation by the state and appellant. This stipulation was as follows:

That Opal H. Lowe, a/k/a Peggy Lowe, died on or about September 17, 1981. That Opal H. Lowe, a/k/a Peggy Lowe, died in Sumter County, Alabama. That said death was caused by a gunshot wound to the back of the head as more fully shown by the autopsy report; that the instrumentality causing the gunshot wound to Opal H. Lowe, a/k/a Peggy Lowe was inflicted in Sumter County, Alabama, on or about September 17, 1981. That said gunshot was fired in the State of Alabama, and the fatal injury as aforesaid, was sustained in the State of Alabama; that Opal H. (Peggy) Lowe had been taken by force, held hostage, and kidnapped in Jackson, Hinds County, Mississippi, on the 17th day of September, 1981, and transported against her will across the Mississippi-Alabama state line into Sumter County, Alabama, where the said Opal H. Lowe, a/k/a Peggy Lowe, sustained the aforesaid gunshot wound. That the body of Opal H. (Peggy) Lowe was found in Sumter County, Alabama, on the 27th day of October, 1981.

Appellant contends that the killing of Mrs. Lowe was "murder" that occurred in the State of Alabama for which only Alabama had jurisdiction. He contends that the indictment and trial of appellant for "capital murder" did not change the act of killing from one single crime consummated in Alabama. Appellant cites several cases regarding venue and jurisdiction from courts of several states. We have examined those cases and find they have no application here. Unquestionably, the State of Alabama could have indicted and tried appellant for murder in that state. It did not do so. The first indictment returned against appellant was in Hinds County, Mississippi, from which county Mrs. Lowe admittedly was kidnapped.

As hereinbefore stated, appellant was indicted under the provisions of MCA § 97-3-19. Under that section the crime of "murder" is defined as the killing of a human being without authority of law by any means or in any manner in the following cases:

(a) When done with deliberate design to effect the death of the person killed, or of any human being.

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(b) When done in the commission of an act eminently dangerous to others and evincing a depraved heart, regardless of human life, although without any premeditated design to effect the death of any particular individual.

(c) When done without any design to effect death by any person engaged in the commission of any felony other than rape, kidnapping, burglary, arson or robbery, or in any attempt to commit such felonies.

The specific indictment returned against appellant was that of "capital murder" under the provisions of MCA § 97-3-19(2)(e) which as hereinbefore set out required conviction for the killing of a human being without the authority of law by any means or in any manner, when done with or without any design to effect death by any person engaged in the commission of the crime of rape, burglary, kidnapping, arson or robbery or any attempt to commit such felonies.

The instrument under which appellant was indicted reads as follows:

That Marion Albert Pruett in said District, County and State on the 17th day of September A.D., 1981, was then and there engaged in the commission of the crime of kidnapping of Opal H. Lowe, a/k/a Peggy Lowe, by he (sic) the said Marion Albert Pruett then and there feloniously without lawful authority, forcibly seizing and confining the said Opal H. Lowe, a/k/a Peggy Lowe, with his intent to cause said Opal H. Lowe, a/k/a Peggy Lowe to be confined against her will, contrary to Section 97-3-53, Mississippi Code of 1972, annotated and amended, and while so engaged in said kidnapping, he, the said Marion Albert Pruett, did then and there, without authority of law, feloniously kill and murder Opal H. Lowe, a/k/a Peggy Lowe, a human being, contrary to and in violation of Section 97-3-19(2)(e), Mississippi Code of 1972, annotated and amended.

Indisputably, the first element of the crime of "capital murder" under the indictment was the kidnapping of Mrs. Lowe. This underlying the necessary to be proved felony continued unbroken until the wooded area in Alabama was reached. We then find the only possible controversy in the record regarding the acts constituting the crime. Appellant testified after making Mrs. Lowe disrobe, he was away from her about fifteen minutes before deciding to kill her. Appellant makes the argument that this period of time broke the chain of events constituting the "capital murder." In addition to this, more than one witness, who visited the scene of the killing with appellant after his apprehension, testified that appellant told them he got no more than around 10 to 15 feet from Mrs. Lowe the entire time. We therefore have two separate admissions. At least it was for the jury to determine whether appellant abandoned the kidnapping and then resumed the act as a mere "murder." In our opinion under appellant's own testimony, he kept complete control of Mrs. Lowe. That was the reason he forced her to disrobe. This control existed until appellant shot Mrs. Lowe in the back of her head. As said above, assuming this to be a finding of fact, the testimony of the witnesses contradicted appellant's testimony that he went to his car for about fifteen minutes before returning and killing Mrs. Lowe. He told them he only went approximately 10 - 15 feet from her which easily could have resulted in a resolving of the extent of the kidnapping control by the jury.

The killing of Mrs. Lowe in Alabama could not have been capital murder unless she first had been kidnapped. The acts are inseparable under that crime. Appellant contends that the actual pulling of the trigger was the primary

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element of the capital murder. If this is true, then there would be no kidnapping by appellant and he would have only had a dead body to steal. He stole the live body activating the elements of the crime of capital murder.

Long before the capital murder statute was enacted by the legislature, our statutes included MCA § 99-11-17, which provides as follows:

Offenses commenced in and consummated out of state.

Where an offense is commenced in this state and consummated out of it, either directly or by the accused or by any means or agency procured by or proceeding from him, he may be indicted and tried in the county in which such offense was commenced or from which such means or agency proceeded.

It is inescapable that the essential and, indeed, underlying element of the crime of capital murder started in Hinds County, Mississippi, when appellant, with a gun drawn and the money sack in his hand, forcefully took Peggy Lowe from her place of employment and admittedly committed the acts herein before set out regarding the kidnapping and killing.

Appellant attempts to raise an issue regarding his request for, and the court granting, an instruction on the lesser included offense of murder. He contends that if the jury had returned such a verdict, it would have been void and for this reason the jurisdictional question should be decided in his favor. Our first reaction to this contention is that appellant may be correct in principle, but his argument is not reasonable. In Bell v. Watkins, 692 F. 2d 999 (5th Cir. 1982), the lower court refused to grant the accused an instruction on the lesser included offense of murder. The Fifth Circuit Court held that the instruction should be granted in a capital murder case, "if the evidence would permit a jury rationally to find [the defendant] guilty of the lesser offense and acquit him of the greater." The appeals court then went on to say, however, "There is no due process violation, however, unless there is some evidence to support an instruction on the lesser included offense." Furthermore, the appellate court said, "In Mississippi no murder committed during the course of a robbery can be simple murder. Since Bell testified to the robbery any murder committed had to be capital." We have the same situation here. Although appellant contends that in his view, he was away from the deceased, after stripping her of clothing to keep her in hand, for fifteen minutes before actually killing her, it is our opinion that as a matter of law the underlying felony of kidnapping never ceased under the testimony. We are forced to the conclusion, therefore, that as the kidnapping was admitted by appellant, the killing could not have been simple murder under the Mississippi statute. We do not have the element as in Bell, i.e., a lack of definition of armed robbery. We have the actual sworn testimony of appellant regarding the undisputed kidnapping. We are forced to the conclusion therefore, that even had the lower court in the case sub judice refused the lesser included offense instruction, any error would have been harmless under the Bell decision.

We have to go further and recognize as stated above that the lesser included offense instruction was actually given. A clear answer to this is as stated in Bell. "[N]o rational jury could have acquitted him of kidnapping or robbery on the evidence presented." In the case sub judice, no rational jury could have acquitted Pruett of kinapping, even until the time the bullet entered the back of the head of the deceased.

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We, therefore, have a situation where appellant voluntarily requested and was given an instruction to which he was not entitled. If wrong in this, however, such does not change a decision of the case. Even if by some strange jury finding, it had returned a verdict of "not guilty" of capital murder but guilty of simple murder, the verdict merely would have been void. Appellant would, therefore, have benefitted from something to which he was not entitled. He was given more than that to which he was entitled and therefore cannot complain.

POINT II. THE LOWER COURT ERRED IN OVERRULING APPELLANT'S MOTION TO SUPPRESS EVIDENCE AND ADMITTING CONFESSIONS INTO EVIDENCE WHICH WERE ELICITED FROM APPELLANT BY PROMISES OF DRUGS FROM AUTHORITIES.

Prior to trial appellant filed a motion to suppress evidence and quash the indictment. This motion recited that appellant was apprehended by law enforcement officers in Stratford, Texas, on October 17, 1981. He was thereafter taken into custody by two officers of the Federal Bureau of Investigation, Agents T. Scott Hendricks and Thomas G. Wagner. The motion does not address any question as to the guilt or innocence of appellant, it already having been assumed by everyone that he was guilty of killing Mrs. Lowe. The motion only addressed whether or not appellant voluntarily agreed to lead officers to her body. Appellant contended in the motion that the two agents offered him cocaine to tell them where the body was located.

Other than the allegations regarding the two FBI agents in Texas, appellant complained that the promises were tendered by O. T. McAlpin of the Jackson Police Department, Detective Monroe and another Jackson police officer, whose name he did not know at that time. The motion stated that these three Jackson police department officers made essentially the same promises as the two FBI agents in Texas. Appellant further contends in the motion that Jackson Police Chief Jim Black and Detective Willie H. Covington ratified the drug promises.

At the pre-trial hearing on the motion to suppress, all of the above named officers testified positively on behalf of the state that the allegations of the motion were untrue and all testified in much detail, both on direct and cross examination, as to what actually happened in their relations with Pruett from the time he was arrested until he finally decided to take them to Mrs. Lowe's body in Sumter County, Alabama. The appellant testified regarding promises of cocaine. He now contends that the state should have reintroduced all the persons he named in his motion to reaffirm their testimony given on direct examination denying ever making any promises of any kind, drug production or otherwise, to appellant. In propounding this contention appellant relies on Agee v. State, 185 So. 2d 671 (Miss. 1966), and Holt v. State, 348 So. 2d 434 (Miss. 1977).

It suffices to say that every required element in Agee and Holt, supra, was met. Appellant had filed his petition setting out only the contention that he had been promised drugs to reveal the location of Mrs. Lowe's body. As hereinbefore stated all persons connected with this contention and named by appellant testified, consuming many pages of testimony denying this contention in detail and explaining everything that occurred. The law does not require foolish actions. This would have been the case had the state been required to resubmit all these officers to repeat everything already testified to under oath including extensive cross examinations.

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The personal sworn testimony of appellant as the only defense witness in the guilt phase of the trial, is inconsistent with his contention in the motion to suppress. He testified that the reason he finally decided to lead officers to Mrs. Lowe's body was so that her family could give her a Christian burial. His testimony was positive that this decision to do this was not based on any promises whatever from anyone.

Under this point appellant contends that the testimony of U.S. Marshals Leonard and Crumption should have been excluded at the trial. These marshals from the Jackson, Mississippi, office accompanied the entourage that appellant escorted to Mrs. Lowe's body. It is first noted, as before stated, that the motion to suppress only encompassed the alleged offenses from the time of the appellant's arrest in Texas until his incarceration in the Jackson, Mississippi, jail. He made no complaint of confessions under duress during his trip from Jackson to the scene of the killing. It is readily apparent that the testimony of United States Marshals Leonard and Crumption were not required on the hearing on the motion to suppress as they had nothing to do with the allegations of the motion.

As a precaution, however, when appellant's attorneys objected to the two marshals testifying about what occurred on the trip to Alabama, the trial court wisely excluded the jury and heard the testimony out of the jury's presence. They were extensively cross examined and any possible error was thereby cured. We reiterate the admission of their testimony at the prior hearing was not required.

On the issue of whether or not appellant, as he testified, voluntarily decided to lead officers to Mrs. Lowe's body, we have the unusual set of circumstances that he did this by leading them through country back roads in the nighttime hours and straight to Mrs. Lowe's body, even through he had been at that location and over those roads one time; that is, the day the kidnapping and killing of Mrs. Lowe occurred. We say this to emphasize the intelligence of appellant and the fact he knew what he was voluntarily doing and was not under the influence of drugs. This, of course, was never suggested.

POINT III: THE LOWER COURT ERRED IN SEATING MR. SIDNEY GRAHAM (JUROR #8) ON THE JURY AND APPELLANT WAS DENIED THE OPPORTUNITY TO EXERCISE PEREMPTORY CHALLENGES IN AN INTELLIGENT AND KNOWLEDGEABLE MANNER BECAUSE OF JUROR'S MISSTATEMENTS DURING VOIR DIRE.

During the course of the trial judge's voir dire questioning of the jury panel members individually, one juror, Sidney Graham, stated that he could vote guilty of the crime of capital murder but under no circumstances could he vote for the death penalty. After completion of the voir dire examination, which was done thoroughly by the trial judge, the prosecuting attorney and competent defense attorneys, the jury was selected and placed in the jury box with two alternates. Admittedly, the prosecuting attorney realized that he had made a mistake and confused the number of juror Graham with another. He had selected Graham, although he was definitely opposed to the death penalty. The prosecutor requested the trial court to allow him to amend his jury striking and either voir dire other jurors or permit an alternate to take the place of Mr. Graham. The court refused permission to do this, saying it came too late, the state already had accepted the fourteen jurors.

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During the above set out request by the prosecuting attorney, the attorneys for appellant vigorously objected to the court granting the prosecutor's request and vigorously objected to juror Graham being excused. The trial judge agreed with them. Of course, it does not take much trial experience to know the defense accepted Mr. Graham.

Appellant now contends that the court was in error in not dismissing Mr. Graham. It should suffice to say that this was vigorously tried to be accomplished by the state over equally vigorous opposition by appellant's attorneys, who now are trying to put the court in error for seating the juror. The state went so far as to try and secure the sentencing hearing of the bifurcated trial by another jury. This request of the state was refused by the trial court.

There is no question involved in this assignment regarding the propriety of the extensive voir dire examination of the jury panel. The next question, therefore, is why was there a unanimous jury verdict sentencing appellant to death? We do not need to do much surmising in arriving at a conclusion regarding this question. In the first place, it is obvious and also impressive that eleven jurors other than Mr. Graham were unanimous in their verdict after hearing the testimony shown in the record. There is absolutely no accusation of fraud on the part of juror Graham.

As heretofore seen, appellant was indicted in the First Judicial District of Hinds County, Mississippi, the most heavily populated county, located in the central-western section of the state and the state capital. Prior to trial, appellant's attorneys filed a motion to change venue of the trial because of extensive publicity, mainly through television and press media. The trial court agreed with this motion and changed the venue of the cause to a county in the northeast part of the state, which county is indisputably out of the range of all Hinds County television stations. We have to surmise as to what information, if any, juror Graham had about the case prior to the trial. It is entirely possible that he had never read or heard of the heinousness of appellant's actions and entirely possible that he had not had any experience with similar heinous crimes. We, therefore, are led to the reasonable probability that his opinion regarding the death penalty was derived from experiences foreign to the case with which we are now involved.

If any person would ever change his mind regarding a prior opinion against the death penalty in any case, this was a typical case for that change to have been made. Juror Graham sat close by appellant when he gave his testimony regarding the details of the robbery, kidnapping and the actions toward Mrs. Lowe up to the time he put a bullet in the back of her head. He heard appellant tell of other murders and robberies. He sat closely to appellant during the entire trial observing and seeing a man who would do what appellant admittedly did in this case and would commit other murders as appellant readily admitted during his testimony. How can it now be said then that Juror Graham violated his oath and that because of such violation, appellant is entitled to a new trial. There is no indication that anything occurred except that the juror changed his mind. There is nothing to indicate duress, undue influence by other jurors, or any other wrong. We find no reversible error here.

POINT IV: THE LOWER COURT ERRED IN ADMITTING AN EDITED TELEVISION INTERVIEW INTO EVIDENCE AT THE SENTENCING PHASE OF THE TRIAL.

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Appellant alleges reversible error by the trial court in permitting portions of a taped television interview with appellant in the Jackson, Mississippi, jail the day after he led officers to Mrs. Lowe's body. The trial court admittedly edited this tape and permitted parts of it to be shown together with sound during the sentencing phase of the bifurcated trial. Appellant's main contention is that as the tape was used along with other evidence to secure a change of venue, it was thereby improper for it to be presented to the jury in the county to which the case was changed.

The obvious answer to the above contention is that the taped interview was used in the hearing on the motion to change venue solely to show that television viewers in the Hinds County, Mississippi, area would have seen and heard the interview. As above stated, the television range of Hinds County television stations did not reach Lowndes County, where the case was tried, a far distance from Hinds County. There was no evidence whatever that the taped interview was seen by anyone in the Lowndes County area.

A transcription of the questions and answers during the taped interview appears in the record and an examination thereof does not begin to compare with appellant's sworn testimony at the trial and could not possibly have done him as much harm as his personal testimony before the jury reciting the gory details of his killing of Mrs. Lowe.

Appellant also contends that introduction of the partial video tape in the sentencing phase was error as it was in essence a confession by appellant. As stated, above, this so-called confession was minimal compared to the prior testimony heard by the jury from appellant's own mouth on the witness stand as to the details of the commission of the crime. We find no merit to this alleged assignment of error.

CONCLUSION

This Court has carefully considered the entire record in the cause together with all briefs, instruments appearing as evidence, exhibits, and everything required of an appellate court. The jury was fully, properly and fairly instructed in both phases of the bifurcated trial. No alleged error is raised in that regard other than on the motion to suppress, and we can find none after a complete review. We have compared this record with prior cases involving the affirmances of the death penalty by this Court. We have placed in our minds the facts of all such death cases since this Court's opinion in Jackson v. State, 337 So. 2d 1242 (Miss. 1976). A study of these cases include, but are not limited to the following: Washington v. State, 361 So. 2d 61 (Miss. 1978); Irving v. State, 361 So.2d 1360 (Miss. 1978); Jordan v. State, 365 So. 2d 1198 (Miss. 1978); Gray v. State, 375 So. 2d 994 (Miss. 1979); Culberson v. State, 379 So. 2d 499 (Miss. 1979); Reddix v. State, 381 So. 2d 999, (Miss. 1980); Bullock v. State, 391 So. 2d 601 (Miss. 1980); Edwards v. State, 413 So. 2d 1007 (Miss. 1982); Johnson v. State, 416 So. 2d 383 (Miss. 1982); Smith v. State, 419 So. 2d 563 (Miss. 1982); Wheat v. State, 420 So. 2d 229 (Miss. 1982); King v. State, 421 So. 2d 1009 (Miss. 1982); and Evans v. State, 422 So. 2d 737 (Miss. 1982).

We find after careful examination that the evidence fully supports the jury's finding of statutory aggravating circumstances as enumerated in MCA § 99-19-101. We find that the sentence of death in this case is not excessive or disproportionate to the penalty imposed in the similar cases considering both

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the crime and the defendant.

We cannot say with any degree of emphasis that the sentence of death was imposed under the influence of bias, prejudice or any other arbitrary factor.

We have reviewed and fully considered the sworn testimony of appellant confessing to and relating in detail his actions in kidnapping Mrs. Lowe and forcibly carrying her to the wooded area hereinabove described and placing a bullet in her head. The principle reason given by him in confessing all crimes regarding Mrs. Lowe and other murders and armed robberies was that he had become a Christian. A careful reading of appellant's testimony both direct and on cross examination is not convincing that the jury verdict of death should be set aside for that reason, if true. Also, the record reveals the rebuttal testimony of Lowndes County Deputy Sheriff Luther James Williams during the sentencing phase and after appellant's testimony to the effect that during the nighttime while he was dispensing medication to the inmates of the Lowndes County Detention Center, he overheard appellant telling a trusty that "he [Pruett] had eleven more places to go to and out of those eleven places someone was gonna make a mistake and that he was -- that -- that he was gonna make his move then and if anyone got in his way, it was more than likely gonna be their skin instead of his because he was trying to save his own hide." The jury certainly had the privilege to weigh the above statement of appellant against his prior confession allegedly because of religious convictions.

Regarding the attorney appointed by the trial court to represent appellant, we feel it our duty to find the following as facts. The attorneys appointed by the court were those of much experience particularly in defending persons accused of crimes both in this state and other states. They are experienced trial attorneys. Their reputation is that of high competence both in preparation and trial. A thorough study of the record reveals that they performed a thoroughly adequate defense of appellant in the trial court. The briefs and arguments before this Court were highly competent. From our knowledge of trial attorneys and particularly the defense of cases such as the one sub judice, it would be hard to secure more competent and experienced attorneys and ones who would have conducted a better defense than was given appellant. They were not "effective" in securing an acquittal, but that was not because they failed to provide appellant competent, proper and fully adequate legal services.

The cause is affirmed and the 13th day of April, 1983, is hereby set for the execution of the death sentence of appellant as provided by law.

AFFIRMED.

WALKER, P.J., AND ROY NOBLE LEE, HAWKINS, DAN LEE, PRATHER AND ROBERTSON, JJ., CONCUR.

PATTERSON, C.J., AND BROOM, P.J., CONCUR IN PART, AND DISSENT IN PART.

BROOM (In Part)

BROOM (In Part)

BROOM, P.J., CONCURRING IN PART AND DISSENTING IN PART:

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As to the jury's finding Pruett guilty as charged, I concur fully with the majority in its affirmance. I would add that a more horrifying and brutish killing cannot be imagined. The act justifies the sentence if properly fixed according to law, but here serious difficulties are manifested by the record insofar as the jury's fixing and death penalty is concerned. For the following reasons, another jury, properly qualified and constituted should set the penalty.

TRUTH has long been the capstone of all judicial proceedings in western civilization. This is so regardless of whether the issue may be a $10.00 loan owed a lender, or the guilt of one who appears to have perpetrated the most heinous and calloused killing. In the early stage of Pruett's trial while jurors were being qualified, juror Graham was voir dired and the following is excerpted from his testimony:

BY MR. GRAHAM: I--I could--could not vote for the death penalty even though he was guilty.

BY THE COURT: What about a vote of guilty as explained to you?

BY MR. GRAHAM: Right, I could vote guilty. For life in prison without pardon.

A little later, the district attorney, Mr. Peters, propounded questions to juror Graham as shown by the following excerpt from the record:

BY MR. PETERS: You said on your form when they asked "What do you think of the death penalty?", you put "yes". When the Judge asked you, you said you could not vote for the death penalty even though guilty. I don't mean--I'm asking--

BY MR. GRAHAM: On the--on--

BY MR. PETERS: Did you make a mistake on the form?

BY MR. GRAHAM: On the first part, I could convict him, but on the last part, I could give him life--sentence him without--to life imprisonment without pardon, but according to my conscience, I couldn't give him the death penalty.

BY MR. PETERS: You could not vote for the death penalty in any circumstances?

BY MR. GRAHAM: Right.

BY MR. PETERS: And you would not be able to follow the law and put aside your personal convictions and vote for the death penalty in a proper case.

BY MR. GRAHAM: No, sir.

After the state failed to peremptorily excuse juror Graham, he was accepted by the defense. Later the district attorney, the Honorable Ed Peters, stated, "We have made an error beyond all errors", and he unsuccessfully sought to have juror Graham replaced by an alternate. Graham was left by the trial judge on the jury and concurred with the other jurors in fixing the death penalty. In so doing, Graham's action was in direct contradiction to what he stated under oath when questioned in open court by the circuit judge and district attorney who later confessed "error beyond all errors".

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Slip Opinion

Majority of the Court takes the position that juror Graham had the right to change his mind after hearing the testimony. If that be in keeping with justice based upon untarnished truth, then why inquire of jurors about their present philosophy concerning death penalty, as we have done through the years before prospective jurors are allowed to become one of the "sacred twelve"? Jurors must be accepted or challenged on what their philosophy is prior to hearing any proof even though testimony may persuade a juror to abandon his or her philosophy. My view is that the trial judge, the prosecutors, and defense lawyers should be able to rely upon what a prospective juror states under oath as to his feelings or philosophy about an issue which is presently to be tried, whether death penalty or some other matter such as whether a juror believes in the law of self defense, etc. Stated differently, the judicial process should not be so concerned with a juror's right to change his mind as with the confidence of a litigant (including counsel) to accept as true what a prospective juror states concerning his convictions regarding justice and rectitude. This Court should not accept less than fidelity to his oath on the part of a juror. Suppose in another case self-defense is an issue, under the majority opinion a juror might begin his service in a trial saying he believed in the right of self-defense and then change his mind.

No case is cited by the majority opinion or by the state in its brief which removes the "taint" resulting in the present trial by the inadvertent error of the prosecution. In order that the "taint" be expiated, the punishment of the defendant should be determined by another panel of jurors who will themselves, with fidelity to their solemn oaths, discharge their duty as fair and impartial jurors.

PATTERSON, C.J., JOINS IN THIS OPINION.

DISPOSITION:
AFFIRMED.

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Office-Supreme Court, U.S.
FILED
JUN 14 1983
ALEXANDER L. STEVAS,
CLERK

82-6933

No. 82
IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1982

MARION ALBERT PRUETT,)
)
Petitioner,)
)
-against-)
)
STATE OR MISSISSIPPI,)
)
Respondent.)

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, MARION ALBERT PRUETT, through attorney advisor Steven B. Bright, respectfully moves for leave to proceed in forma pauperis pursuant to Rule 46 of this Court.

1. Petitioner is an indigent resident of Death Row at Parchman, Mississippi. The state court below determined that he was indigent and appointed attorneys to assist him in his criminal trial.

2. Petitioner's affidavit in support of this motion is attached.

WHEREFORE, Petitioner prays that he be permitted to proceed in forma pauperis.

Respectfully submitted,

Steven B. Bright/jmb

Steven B. Bright
Attorney Advisor to Petitioner
600 Healey Building
57 Forsyth Street, N.W.
Atlanta, Ga. 30303
(404) 688-1202

No. 82 -

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

MARION ALBERT PRUETT,

Petitioner,

-against-

STATE OF MISSISSIPPI,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON PETITION FOR CERTIORARI IN FORMA PAUPERIS

I, MARION ALBERT PRUETT, being first duly sworn, depose and say that I am the Petitioner in the above-entitled case; that in support of my motion to proceed on petition for writ of certiorari without being required to pre-pay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the petition are true.

1. Are you presently employed? Yes_____ No _____

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. _____

   b. If the answer is no, state the date of your last employment and the amount of salary and wages per month which you received. _____

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other source?

Yes _____ No NO

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months. _____

_____

3. Do you own any cash or checking or savings account?

Yes _____ No NO

a. If the answer is yes, state the total value of the items owned. _____

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Yes _____ No NO

a. If the answer is yes, describe the property and state its approximate value. _____

_____

5. List the persons dependent upon you for support and state your relationship to those persons.

NONE

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Marion Albert Pruett
MARION ALBERT PRUETT

STATE OF MISSISSIPPI

COUNTY OF [illegible]

SUBSCRIBED AND SWORN TO

before me this the 5 day of [illegible], 198[illegible].

[illegible] Clerk

My Commission expires

[illegible]

CERTIFICATE OF SERVICE

I, the undersigned, a member of the bar of the Supreme Court of the United States hereby certify that a copy of the foregoing Petition for Writ of Certiorari to the Supreme Court of Mississippi was served upon the respondent by mailing a copy to Assistant Attorney General, William Patterson, 450 High Street, Carroll Gartin Building, Fifth Floor, Jackson, Mississippi 39205, this 14th day of June, 1983.

Steven B. Bright /jmb

Steven B. Bright
Suite 600, Healey Building
57 Forsyth Street, N. W.
Atlanta, Georgia 30303
(404) 688-1202

Attorney Advisor for Petitioner